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Injury Liability Gazette

3rd edition

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- 2007 Finalist ALB Australasian Law Awards – Brisbane Law Firm of the Year
- 2006 Winner BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year)
- 2005 Winner ALPMA/Locus Innovation Awards for innovative CN|Direct
- 2005 Finalist BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year)

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From the Insurance Team

Compiled by our Property and Injury Liability team, the 3rd Injury Liability Gazette is designed to provide useful, practical and current information to the insurance industry.

Our Property and Injury Liability team, led by partners Rebecca Stevens, Glenn Biggs and Stephen White, acts exclusively for major insurance companies, corporate insured's, Lloyd's syndicates, underwriting agencies, captive insurers, affinity groups, self insureds and insurance brokers.

Our team advises clients on claims strategy, risk management and procedure reviews, as well as policy advice and the defence of litigated claims. Our team acts in many industries and has specific experience with respect to:

- Retail, shopping centres and commercial property owners' and occupiers'
- Hoteliers and sporting and recreation facilities
- Community organisations, including schools, child and aged care facilities.

In addition, the group also advises on products' liability, products' recall, and products' guarantees; heavy vehicle and motor vehicle claims, fire claims and recoveries.

Our lawyers are well versed in tort reform legislation and the application of personal injury awards. Showcased in our publications and newsletters, this expertise is gained from handling hundreds of claims, mediations and court procedures, and ensures our clients benefit by receiving the very best advice and resolution strategies.

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Case Note

Davis v Swift [2013] NSWDC 99

The plaintiff alleged she was injured when a parked car unexpectedly turned out of a parking space and hit her.

The facts

The plaintiff was injured when attempting to cross a two lane road. She said she stepped off the footpath between two parked cars and moved a short distance into the roadway so she was standing directly in front of the right hand headlight of a car parked to her right. Deciding it was not safe to cross, she alleged that, as she turned to step back onto the footpath, the car parked to her right unexpectedly turned out into the traffic. Her shoe became caught under the front right wheel of the car. She fell and the car proceeded to drive over her right leg, causing her injuries to her right leg and foot and a subsequent psychological injury.

The plaintiff alleged various breaches of duties of care by the defendant driver, including failing to keep a proper look out and failing to take reasonable care for the safety of pedestrians.

Evidence of witnesses

There were several witnesses to the incident.

One testified that he saw the plaintiff step into the roadway and then walk backwards towards the right front side of the car.

Another testified that she saw the plaintiff move towards the middle of the road and then run back towards the kerb, but she could not remember if the plaintiff was facing forwards or backwards when she did so. This witness also testified that she saw the driver of the parked car look over her shoulder to check oncoming traffic.

A third witness saw the incident on CCTV footage captured by cameras located at the front of a licensed venue on the side of the road where the incident occurred. This footage was inadvertently lost before the trial. That witness testified that he saw (in the footage) the plaintiff walk out into the middle of the road and then walk backwards towards the defendant's vehicle. The third witness' evidence was given little weight because he viewed the incident on CCTV rather the seeing it firsthand, but it did serve to corroborate the evidence of the first witness that the plaintiff walked backwards towards the defendant's vehicle from the roadway.

The defendant driver testified that she looked over her shoulder to check oncoming traffic, turned her wheel full lock and started to creep out of the car space when she felt a bump. The defendant said, by the time she began to turn out of the parking space, she was facing

forwards again. When asked why she did not see the plaintiff if the plaintiff was in front of her vehicle and she was facing in that direction, she said the plaintiff must have walked backwards into her blind spot (that is, the front right pillar was obscuring her view).

Decision

Gibson DCJ concluded that the incident could not have happened in the manner alleged by the plaintiff. It would not be physically possible for the plaintiff to be standing in the place she claimed she was (in front of the headlight) and be struck first by the right wheel of the car. Her Honour thought the evidence indicated that the plaintiff had caused the accident by moving towards the middle of the road and then quickly backwards from the middle of the road into the path of the defendant's vehicle when she saw oncoming traffic from the far lane.

Her Honour was of the opinion that the defendant had not breached a duty of care owed to the plaintiff because the defendant had no reason to think that the plaintiff might suddenly reverse her course and step into the path of her vehicle which was about to move into the traffic lane.

Had the plaintiff been successful Gibson DCJ assessed the plaintiff's contributory negligence at 100% where the plaintiff, by venturing into a busy road, was engaged in a hazardous act, by unexpectedly running backwards across the road without looking where she was going.

A blameless motor accident?

Section 7B of the *Motor Accident Compensation Act 1999* (NSW) deems the owner of the driver of vehicle involved in a '*blameless accident*' (an accident not the fault of the driver of the vehicle or any other person) to be at fault. Her Honour, applying authority on the section, said that the circumstances of the case were such as to warrant a reduction of 100% for contributory negligence as the plaintiff was the sole cause of the accident.

Damages

Had the plaintiff been successful in establishing liability against the defendant, her compensable damages would have been assessed at $158,712.75.

Key to Gibson DCJ's assessment were her findings as to the plaintiff's credit.

Firstly, surveillance taken following the incident showed the plaintiff greatly exaggerating her physical limitations, particularly her inability to walk without a limp or to walk for long periods without pain. The plaintiff was captured briskly walking in high heeled shoes post incident, giving support to the suggestion that the plaintiff was exaggerating the degree of disability she suffered because of the injury.

Secondly, the plaintiff's claims for past and future economic loss were inconsistent with her employment history and taxation records. The plaintiff was found to have earned little or no money for most of her adult life. She had suffered from a long standing chronic psychiatric illness well before the incident and this was ultimately factored into the Her Honour's assessment of the actual economic loss suffered by the plaintiff and her economic loss in the future.

Gibson DCJ's accepted that the plaintiff did sustain serious injuries to her right leg and foot, but found that any psychological or psychiatric injury resulting from the incident had resolved. Her Honour allowed buffer awards for past and future economic loss as it was difficult to assess with any degree of certainty the extent of this loss having regard to the plaintiff's employment capacity prior to the incident.

Case Note

Jasmin Fazlic v Jonathon Keily [2013] ACTSC 144

The plaintiff suffered injuries in a motor vehicle accident and a subsequent assault, and the question of a reduction of the quantum for vicissitudes was considered.

The facts

On 28 March 2007, the plaintiff was involved in a motor vehicle collision while driving to work in heavy traffic. The car driven by the plaintiff was struck from behind by the defendant's car after the defendant failed to bring his car to a stop. The defendant admitted liability for the collision.

The plaintiff allegedly sustained injuries to his neck, lower back and lumbar spine, as well an adjustment disorder with anxiety and depression. As he was on his way to work at the time of the accident, the plaintiff was entitled to workers' compensation. The workers' compensation insurer paid for the plaintiff to undergo a multi-disciplinary rehabilitation program to treat his injuries. He continued to work part-time, gradually increasing his hours in the months following the incident.

Some seven months following the incident, the plaintiff, who was a disability support worker, was assaulted by a client while he was at work. The assault involved the plaintiff being hit on the left side of his head, behind the ear. This caused swelling and feelings of stress. After a week off work, the plaintiff was certified as able to return to suitable duties. However, his employer told him that no suitable duties were available. Although the plaintiff said that he had tried to obtain work afterwards, he was unable to sustain any full time employment from October 2007 onwards.

The plaintiff's evidence was that he got over the assault within a week or so and that his continuing problems after that time were limited to those arising from his injuries sustained in the initial motor accident.

Issues

The court was asked to determine the quantum of damages that were recoverable from the defendant.

Decision

Medical evidence

The plaintiff was seen by 12 separate specialists in

relation to his continuing psychological and medical conditions.

The plaintiff's treating doctors all came to a similar conclusion in relation to plaintiff's physical injuries. Dr Chandran, a neurologist, gave evidence that the plaintiff suffered from a pre-existing asymptomatic multi-level degeneration of his lumbar spine prior to the accident. Dr Rasaratnam, the plaintiff's treating GP, was of the opinion that the plaintiff had pre-existing lumbar spondylosis and that the accident caused this condition to become symptomatic. Dr Jackson, an orthopaedic surgeon, held a similar view and considered that the plaintiff's symptoms could improve but it was not uncommon for some of the symptoms to remain indefinitely. A neurologist for the plaintiff, Dr Brooder, was also of the same opinion.

Dr Warfe and Dr Le Leu, both occupational physicians, gave evidence for the plaintiff. Dr Warfe diagnosed the plaintiff with degenerative lumbo-sacral spine disease which had been aggravated by the motor accident. He noted there were multiple impediments affecting his ability to return to work including his degenerative spinal condition, an associated adjustment disorder, protracted workplace conflict and his social isolation, as well as a failed attempt at vocational rehabilitation. Without improvement, the plaintiff would require a regular medication regime, intense rehabilitation, physiotherapy and psychological support. Dr Le Leu concluded that the plaintiff had pre-existing cervical and lumbar spine conditions which manifested after the accident as neck and low back pain. As well as this, the plaintiff's pre-existing anxiety and depression was significantly exacerbated, but it was unclear the extent to which this was caused by the motor vehicle accident as compared to the work incident which occurred some time later. Dr Le Leu considered that the plaintiff could physically cope with some types of jobs but added that the plaintiff may lack the appropriate skills or education.

The expert, who was most critical of the relationship between the motor vehicle accident and the plaintiff's ongoing difficulties, was the occupational therapist for the defendant, Dr Silver. Dr Silver concluded that the motor vehicle collision was only moderate (although the judge remarked that Dr Silver had no qualifications to comment on this) and for this reason the plaintiff's lumbar spine injuries were '*rather innocuous*'. He also had a poor opinion of the plaintiff, noting that there was a '*major psychological overlay*' influencing the plaintiff's presentation. Dr Silver's view was that the plaintiff was physically capable of returning to working full time in his pre-accident duties and fit for semi-sedentary activities in administrative or managerial roles.

In relation to the plaintiff's psychological condition, five expert opinions were considered at trial.

Dr Knox, a psychiatrist called by the plaintiff's solicitor, was of the opinion that the plaintiff had a major depressive disorder and anxiety, as well as a pain disorder that was attributable to his psychological and medical condition. He considered that the motor accident had been a major contributing factor in the plaintiff's impaired health. He was of the view that the plaintiff was unfit for employment and had poor future employment prospects. Mr McHugh, a psychologist for the plaintiff, also held a similar view in relation to the plaintiff's diagnosis and confirmed that, while the plaintiff was a somewhat anxious and nervous individual, he had been socially and psychologically functional prior to the accident. Therefore, his continuing psychological difficulties were caused by the motor accident.

The psychologist for the defendant, Dr Roldan, diagnosed the plaintiff with an adjustment disorder with mixed anxiety and depressed mood that was reactive to a combination of stressors. However, his view was that the plaintiff could undergo a graduated return to work program. Similarly, the defendant's experts, Professor Pryor, a vocational psychologist, and Dr Zemen, a rehabilitation consultant, were of the view that the plaintiff was unable to return to his previous employment as a disability support worker but that he was physically capable of light and sedentary work, and there were reasonable prospects for him to return to work on a graduated basis.

After considering the expert evidence, Harper J concluded that the plaintiff was a witness whose evidence regarding his condition could be generally relied upon. His Honour preferred the expert opinions of Dr Warfe and Dr Le Leu regarding the plaintiff's physical injuries over the opinion of Dr Silver, as His Honour considered that Dr Silver's opinion was affected by his views on the seriousness of the motor vehicle collision and the plaintiff's credibility.

Overall, His Honour accepted that the plaintiff had been totally incapacitated for work since he stopped working in October 2007. It was held that the plaintiff could not return to his pre-accident duties and that he had poor prospects for future employment.

His Honour was required to consider the effect of the assault on the plaintiff's overall presentation

'His Honour was required to consider the effect of the assault on the plaintiff's overall presentation and whether the effects of this event were causally independent from the injuries sustained in the earlier motor accident.'

and whether the effects of this event were causally independent from the injuries sustained in the earlier motor accident. Counsel for the defendant argued that the assault of October 2007 should be seen as an act breaking the chain of causation between the defendant's original negligence in causing the motor accident and injury to the plaintiff, and the plaintiff's current problems. In effect, it was argued that the assault was solely responsible for all of the plaintiff's problems after that event.

His Honour disagreed that the injuries sustained in the assault were causally independent from the initial motor accident. Instead, His Honour adopted the reasoning from his earlier decision *Cairns v Woolworths Limited*[1] where he concluded that the correct approach to assessing the plaintiff's damages was to consider whether an injury resulting from a subsequent incident caused the damage to be greater because of the aggravation of the earlier injury due to the defendant's negligence. If so, the additional damage resulting from the subsequent accident should be treated as having been caused by the defendant's earlier negligence.

Based on this approach, His Honour concluded that the damage to the plaintiff occasioned by the assault was greater because of the initial motor accident. It was held that, following the assault, the plaintiff suffered an increase in his lower back symptoms and his psychological symptoms which had been present since the motor accident. However the subsequent assault aggravated the plaintiff's low back symptoms for a brief period and worsened his mental state for an extended period.

His Honour was satisfied that, but for the injuries sustained in the motor accident, the plaintiff would have been able to continue working notwithstanding the other events in his life, including the subsequent assault.

Quantum

His Honour accepted that the plaintiff suffered from severe and disabling low back pain as a result of the motor accident and assessed the plaintiff's general damages for pain, suffering and loss of enjoyment of life at $120,000.

His Honour accepted that the plaintiff may require further psychological counselling, physiotherapy or massage therapy in the future. Allowing a monetary '*buffer*' for the cost of this treatment, the plaintiff was awarded $20,000 for future expenses.

There was some difficulty in calculating the plaintiff's economic loss, where the plaintiff had remained in receipt of workers' compensation following the trial. His Honour noted that from the date of the accident until 27 July 2008 (at the end of the work trial), the plaintiff had received worker's compensation of $35,586. His Honour accepted this was the equivalent of the plaintiff's compensable loss inclusive of income tax (the *Fox v Wood* component). From July 2008 to the start of the trial in September 2011, the plaintiff was unable to earn income due to his injuries and he lost $126,340 including tax. For the period following the trial, it was held that the plaintiff would have earned $800 net per week but-for the injury.

As the plaintiff had continued to receive workers' compensation following the trial, His Honour was forced to stand the matter over to enable the calculation of the workers' compensation refund owed to the insurer on the judgment of the claim, the interest on past loss of earnings and the component of deducted tax.

The plaintiff was 50 years old at the time of the trial. The plaintiff's future economic loss was assessed on the basis that he would have continued to work until retirement age (67 years old), earning $800 net per week. To reflect the plaintiff's potential residual earning capacity and the possibility that the plaintiff may return to work in the future, the award was reduced by one third for vicissitudes. In total, the plaintiff was awarded $337,000 for future economic loss.

Finally, His Honour accepted the plaintiff had required varying levels of assistance from his first wife, his second wife, his mother and friends for household and gardening tasks over the years because of the injuries sustained in the motor accident and associated chronic conditions. The plaintiff was awarded damages for past gratuitous care in the amount of $10,000 and a further $10,000 for the plaintiff's future care needs.

[1] [2005] ACTSC 95 [204].

Staff profile Construction & Engineering

Mark Kenney

Special Counsel

Mark Kenney has over 12 years experience working in the construction, infrastructure and resources sectors focusing on contract negotiation and drafting.

Mark has a proactive approach and is often involved from the outset of the tendering and negotiation phases, through early works, up to execution of the agreed contract. Post contract he advises on subcontract and consultancy arrangements, ongoing contract management, procurement and the engagement of service providers, right through to renegotiation and renewal of existing contracts.

Mark has a particular interest in large scale infrastructure projects delivered by specially tailored or innovative contracting arrangements such as early contractor involvement, EPC and EPCM, joint ventures and alliances.

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Case Note

Andreou v Woolworths Limited [2013] NSWDC 83

The plaintiff slipped and fell in a supermarket and the court considered whether the risk was foreseeable or obvious and whether the plaintiff exhibited contributory negligence.

The facts

The plaintiff sought damages against the defendant, Woolworths, for injuries she allegedly sustained in a fall at the defendant's supermarket premises in April 2009.

On the day of the incident, the plaintiff attended a Woolworths supermarket with her mother. The plaintiff alleged that, as she was walking down an aisle, she noticed that a portion of the ceiling was leaking rainwater onto the floor of the premises and water was spreading quickly over the floor surface. As she turned to walk away from the water, the plaintiff slipped on the wet floor, allegedly suffering injuries to her neck and left shoulder, and soft tissue injuries to her lumbar and thoracic spine. A few seconds after the plaintiff's fall, a section of the ceiling collapsed in an adjacent aisle. The supermarket was evacuated.

Issues

The court summarised the issues to be determined as follows:

- The circumstances of the plaintiff's injury;
- Whether the injury sustained by the plaintiff was due to the materialisation of an obvious risk;
- Whether the defendant was in breach of the duty of care it owed to the plaintiff and therefore negligent;
- Whether the plaintiff demonstrated contributory negligence; and
- The correct assessment of the plaintiff's damages, having regard to the plaintiff's significant pre-incident medical history.

Findings of fact

Clarification of the circumstances of incident

Ms Wilson, the Woolworths duty manager, was called to give evidence. Ms Wilson recalled that it had been raining heavily on the night of the incident. At about 6.30pm Ms Wilson was informed by another Woolworths staff member that a portion of the ceiling had collapsed. By the time Ms Wilson came to inspect the collapse, she observed that water was coming out of the ceiling at a frequent rate and the water on the floor was noticeable. She closed and evacuated the store in accordance with the defendant's standard procedure.

Ms Wilson, who had worked at this store since 2003, confirmed that she was not aware of any ceiling leakage occurring at the store, and described the collapse as a '*one off event*'.

The plaintiff, who had been a regular customer at this store, gave evidence that she had seen water dripping from the ceiling into buckets placed on the floor in the months leading up to the incident but not on the day of the incident. The plaintiff's mother gave evidence that, on the day of the incident, she saw buckets placed on the floor towards the back of the store.

This evidence contradicted the evidence given by Ms Wilson who said that she had never observed buckets being used at the premises to catch leaks and further that such a measure would not have been part of the store's safety protocol.

From the evidence before it, the Court was satisfied that, in the context of heavy rain and the collapse of a portion of the ceiling, the liquid in which the plaintiff slipped was due to rainwater penetration from outside of the building. It was accepted that the flow of water occurred suddenly, and was described as a '*rapidly evolving scenario*'. By the time the plaintiff approached the aisle, the water had started to flow from a vent in the ceiling at a significant rate. The Court accepted that the plaintiff turned around to walk away from the water but it continued to spread at a rapid rate along the floor.

No evidence was tendered by the plaintiff to suggest that the water penetration, or the collapse of the ceiling, were as a result of poor maintenance and repair, or were reasonably foreseeable occurrences.

The Court accepted there were no buckets located in the store to catch water on the day of the incident.

Injuries sustained in the fall

The plaintiff stated that, as a result of her fall, she injured her left shoulder when she landed on it. There was no mention of any actual injury in the hospital notes taken three days after the incident. The first report of the left shoulder injury occurred some nine months later.

Having regard to the length of time between the contemporaneous medical records on the incident and the first complaint of shoulder pain some months later, the Court held that the plaintiff did not sustain any left shoulder injury in the fall. The Court concluded that the injuries sustained in the fall where limited to soft tissue injuries to her neck, the area across the top of her shoulder blades, and her lumbar and upper thoracic spines.

Liability

Obvious risk

The defendant argued that the plaintiff's injury was a result of the materialisation of an obvious risk, being the water flowing onto the floor of the premises.

The Court was not satisfied that the defence of obvious risk had been established because, by the time the plaintiff was confronted with the realisation the floor was wet, she had insufficient time to consider the nature of the risk and take steps to avoid it.

Breach of duty of care

The Court was not satisfied that the defendant breached its duty to take reasonable care for the safety of customers, including the plaintiff.

In the absence of evidence to suggest that the incident was caused by poor maintenance or repair of the premises, there was no basis to suggest that the defendant ought to have reasonably foreseen that water was likely to penetrate the ceiling, spill onto the floor and present a fall hazard to customers.

Further, it was not necessary for a reasonable supermarket proprietor to have taken any specific precautions for this risk until it had materialised. That is, only once the water began to fall from the ceiling onto the floor did it become necessary to isolate the area and warn shoppers or close the store (which is what Woolworths did).

It was concluded that the incident was an unfortunate accident for which Woolworths was not legally liable.


CAUTION
WET
FLOOR

Contributory negligence

Contributory negligence was not established because, by the time the plaintiff realised the floor was wet, she had insufficient time to consider the nature of the risk and take steps to care for her own safety.

Damages

The plaintiff had a significant medical history involving prior falls, illnesses and health problems. In particular, the plaintiff dislocated her left shoulder in 2004 which she continued to dislocate over time and had received stabilisation surgery. The plaintiff had a history of chronic back and shoulder pain, depression and was also morbidly obese.

'The plaintiff had a significant medical history involving prior falls, illnesses and health problems'

At the time of the accident, the plaintiff was not employed due to her childcare responsibilities, including the special intensive needs of her young son who suffers from autism. She gave evidence of her intention to seek part-time employment in 2011 and full-time employment in 2015 when her children would both be at school.

The Court found the plaintiff's left shoulder problems were due to pre-existing causes and not due to the incident, and the plaintiff's ongoing difficulties relating to the fall were limited to her neck pain and associated restrictions.

With respect to past economic loss, the court held that, notwithstanding the plaintiff's stated intentions in relation to future part-time and full time employment, the plaintiff's childcare responsibilities would have made the prospect of the plaintiff securing and maintaining such employment unrealistic and improbable. Accordingly, although a degree of impairment in her earning capacity was shown on the evidence, the plaintiff was not found to have suffered any past economic loss.

The Court accepted that the plaintiff's accident-related injuries might impact on her future capacity to earn income. However, it was determined that future economic loss should be assessed subject to a number of discounting factors, particularly the ongoing effects and vulnerabilities resulting from her earlier injuries, her significant and unrelated left shoulder problems and a number of other illnesses. In these circumstances, the plaintiff was awarded a buffer for future loss of earning capacity in the sum of $50,000.

Finally, in relation to domestic assistance, the plaintiff's evidence gave very little guidance on whether she met the threshold requirement of six hours per week as required under the *Civil Liability Act 2002* (NSW). Further, the vast majority of the tasks for which the plaintiff claimed a need for care related to the left shoulder so they were unrelated to the subject incident. It was therefore concluded that, if the plaintiff had succeeded in her claim, no damages for domestic assistance would have been awarded.

Case Note

Machado v Advanced Dermatology Group Pty Ltd [2013] NSWDC 85

Laser treatment provider not liable for facial burns suffered by the plaintiff during a cosmetic facial laser treatment.

The facts

In 2007, the plaintiff underwent three non-surgical cosmetic laser treatments on her face which were carried out over a period of several months (**laser treatments**). The laser treatments, intended to rejuvenate the plaintiff's skin, were administered by persons who were trained in the use of the laser equipment by its manufacturers but were not medical practitioners or trained in any biological science.

In late 2008, the plaintiff sought another series of three treatments. On the second treatment in this series, the plaintiff received burns to her face, initially suffering pain, redness, swelling and blistering and ultimately scarring of her skin. She claimed damages for personal injury through a claim in negligence alleging that the defendant, among other matters:

- Failed to administer the laser treatment and use the equipment in a safe and competent manner;
- Failed to discontinue the laser treatment when the plaintiff complained of pain and when the smell of burning flesh was apparent;
- Failed to properly warn the plaintiff of the risk of adverse outcomes of scarring; and
- Failed to advise the plaintiff of the actual damage to her skin and refer her to medical remedial treatment.

Issues

The three main issues canvassed by the court in relation to liability were:

- Whether the defendant was the entity that performed the laser treatment;
- The nature of the laser treatment and the plaintiff's understanding of the laser treatment; and
- Whether the defendant was negligent in the provision of the laser treatment.

Decision

What was the nature of, and the plaintiff's understanding of, the laser treatment?

When the plaintiff first attended the defendant's premises, she filled out a client intake form which, amongst other things, identified the nature of business she was attending. She also had a consultation with a staff member in which she stated she was looking for a non-surgical face lift. A 60 minute face lift procedure was discussed and the plaintiff was quoted a price of $3,000 for three treatment sessions.

The plaintiff testified that she did not have the risks associated with the laser treatment discussed with her, nor was she given warnings about adverse outcomes or know that she was agreeing to laser treatment on her face.

With respect to the alleged lack of pre-treatment warnings, the plaintiff argued that she could not recall any discussion about adverse outcomes more serious than her face going 'a bit pink'. On the other hand, the treatment provider, who testified for the defendant, was adamant that the treatment would not have been provided to the plaintiff without a discussion about the adverse outcomes that materialised, namely redness, hyperpigmentation, blistering and scarring.

His Honour criticised the plaintiff's recollection of events as being inaccurate and did not accept that she was uninformed about laser and other cosmetic procedures. Favouring the treatment provider's evidence, he concluded that the laser treatment was not undertaken without a discussion of potential adverse outcomes.

Was the laser treatment administered negligently?

The nature of the duty of care allegedly owed by the treatment provider in carrying out the laser treatment was not clearly made out by the evidence led at trial. The plaintiff argued that the duty of care the treatment provider owed her was something akin to the duty that a doctor owes a patient. Given the type of business that provided the laser treatments, this was considered by the court to be an overstatement of the duty of care owed to the plaintiff.

The court agreed that the plaintiff was owed a duty that reasonable care would be taken in the provision of information about the risks associated with the laser treatments. On this point, the court was satisfied that the plaintiff was provided with adequate information and warnings at all stages of her dealings with the defendant.

The plaintiff alleged that the actions of the laser treatment provider in performing the treatment were negligent. No expert evidence was led to substantiate this part of the claim. Without evidence as to the correct method of application of the laser treatments, the correct temperature or other settings on the machine or details of what would constitute a safe and competent standard of treatment in the type of clinic the plaintiff had attended, the Court was unable to make a finding of negligence.

An expert for the plaintiff submitted that the laser device should have been tested on an inconspicuous part of body to determine how her skin would react to the treatment. However, no evidence was led to demonstrate how this proposed course of action would have been indicative of how the skin of her face would have reacted to the treatment and the cumulative effect of multiple treatments. Again, the court found the evidence was insufficient to demonstrate negligence by the treatment provider for a failure to do so and considered that argument simply proposed an application of hindsight.

As for the allegation that the treatment provider failed to discontinue the treatment when the smell of burning flesh was apparent, the treatment provider gave evidence that it would in fact have been the smell of tiny hairs on the plaintiff's face burning and that this was perfectly normal in this type of treatment. This was undisputed so was ultimately accepted.

Conclusion

The plaintiff agreed to have the treatment, was warned of the possibility of the particular adverse outcome which eventuated and was unable to provide sufficient evidence to show that the standard of treatment she received constituted a departure from that required by a cosmetic treatment provider. As a result of insufficient evidence, despite accepting that the plaintiff's face was burnt by the laser treatment, the Court determined that the plaintiff had not established that she suffered injury as a result of the treatment provider's negligence.

Staff profile Insurance

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Allison Bailey is a Senior Associate in the Property and Injury Liability team where she acts for insurers and corporations across a broad range of public and product liability disputes. Allison has a particular interest in product defects and the operation of the Australian Consumer Law, having worked with national businesses in relation to losses arising from products and services with a view to resolving disputes and managing brand reputation.

Over her eight years at Carter Newell and in her role as Secretary of the Association for Women in Insurance (Qld), Allison has established relationships across the insurance industry and provides advice on indemnity disputes, liability issues and complex quantum claims involving retailers, manufacturers, building and construction service providers and mining companies.

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Case Note

Gaynor Colleen Smith v Jones Lang Lasalle [2013] NSWDC 155

Shopping Centre not liable to plaintiff for 'trip' on small crack.

The facts

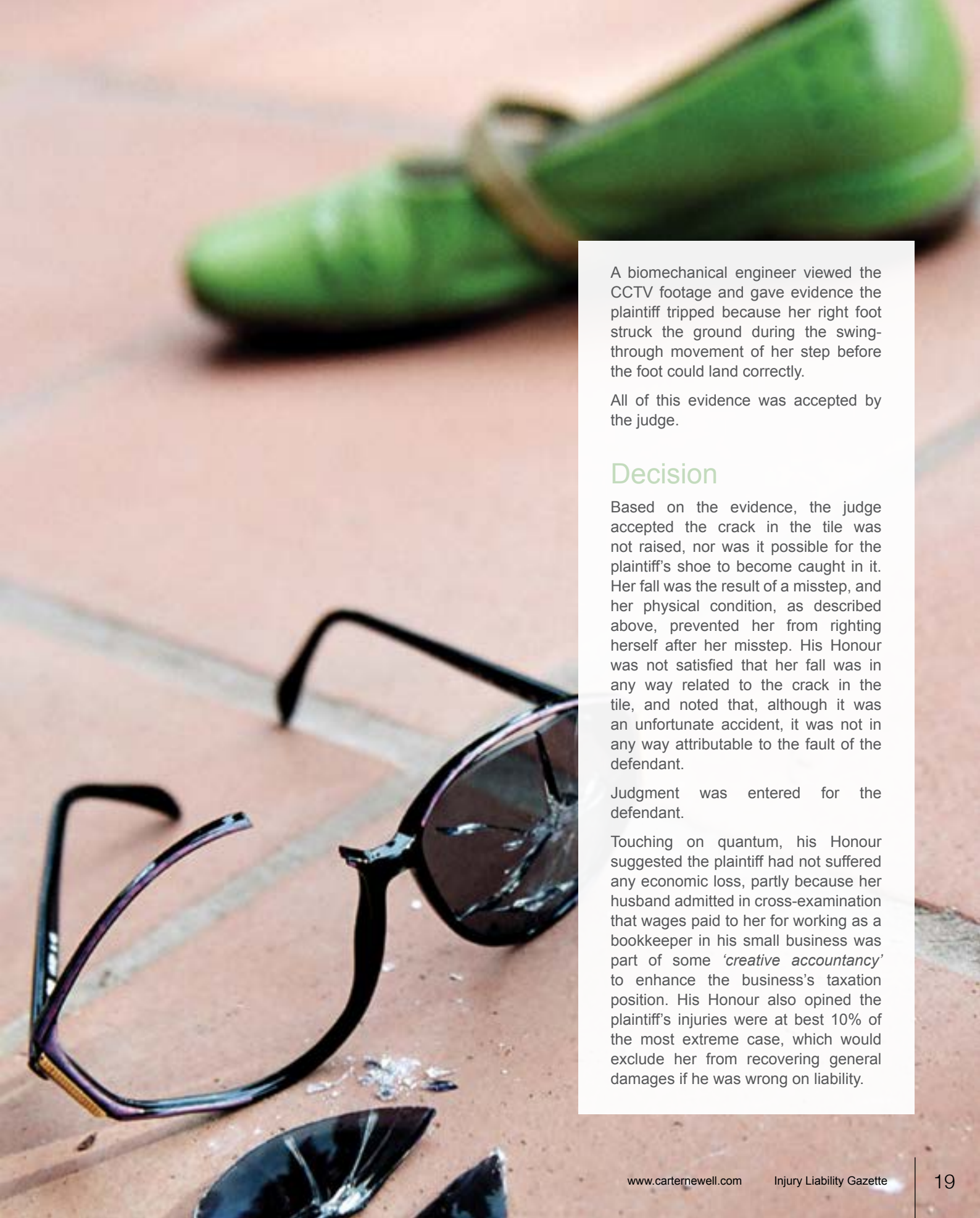
The plaintiff, *'a rather bulky woman with a shuffling or swaying gait'*, allegedly tripped and fell on a cracked flooring tile in the defendant's shopping mall. It was her case that the defendant was negligent in permitting the tile to be present on the floor.

According to the plaintiff, she was walking across the concourse of the shopping mall when her right shoe became caught in a large crack in a flooring tile. She fell heavily forward, and as a result, suffered soft tissue injuries to her back and right leg. CCTV footage of the incident clearly showed the plaintiff tripping, but it was unclear in the footage exactly what she tripped on.

Photographs taken soon after the incident showed a crack in a tile in the vicinity of where the plaintiff fell. A security guard who attended the plaintiff soon after the fall says he ran his hand over the crack and found it to be smooth and with no sharp edges. He said he slid his shoe over it and again found it to be smooth. He also took measurements; according to him the greatest width of the crack was 3 mm and the greatest depth was 2 mm.

The centre manager was called to give evidence about the defendant's response to the existence of the crack. She stated she was aware of the crack in the tile before the plaintiff's fall. She described the system of inspection with respect to hazards, saying that centre staff walked through the centre every day and noted on a checklist anything that might require maintenance or rectification. It was in this way the subject crack had been brought to the centre manager's attention, but she did not consider it a hazard. She also said she, like the security guard, closely inspected the crack and found it to be smooth.

A report of an examining specialist was also tendered into evidence. The doctor noted the plaintiff was heavily overweight (a fact the plaintiff disputed despite her appearance and medical evidence to that effect) and suffering from pre-existing degenerative and osteoarthritic conditions in both her knees and hips. This combination, he said, would mean it was likely she would be physically unable to prevent herself from falling if she overbalanced and her momentum carried her forward.



A biomechanical engineer viewed the CCTV footage and gave evidence the plaintiff tripped because her right foot struck the ground during the swing-through movement of her step before the foot could land correctly.

All of this evidence was accepted by the judge.

Decision

Based on the evidence, the judge accepted the crack in the tile was not raised, nor was it possible for the plaintiff's shoe to become caught in it. Her fall was the result of a misstep, and her physical condition, as described above, prevented her from righting herself after her misstep. His Honour was not satisfied that her fall was in any way related to the crack in the tile, and noted that, although it was an unfortunate accident, it was not in any way attributable to the fault of the defendant.

Judgment was entered for the defendant.

Touching on quantum, his Honour suggested the plaintiff had not suffered any economic loss, partly because her husband admitted in cross-examination that wages paid to her for working as a bookkeeper in his small business was part of some *'creative accountancy'* to enhance the business's taxation position. His Honour also opined the plaintiff's injuries were at best 10% of the most extreme case, which would exclude her from recovering general damages if he was wrong on liability.

Case Note

Cameron v RACQ Insurance Limited [2013] QSC 124

An application for the respondent insurer to provide information to the claimant that it did not possess but was able to obtain.

The facts

On 26 May 2013, the applicant was riding to work when, at some time between 5:30am and 6:02am, he was struck by a truck and suffered a traumatic brain injury.

Soon after the accident, the truck driver made two phone calls to his employer. It was the applicant's case that the truck driver's phone records could be used to establish the time of the accident with some precision, which was important because it was thought that pinpointing it would enable the level of ambient light to be established.

The applicant requested a copy of the phone records from the truck driver's insurer. The insurer refused to provide them or to take steps to obtain them because, so it was said, they were not about the circumstances of or reasons for the accident.

It was the applicant's case that s 47(1)(b) of the *Motor Accident Insurance Act 1994* (Qld) (**Act**) (which is analogous to s 271 (b) of the PIPA) imposed on the insurer an obligation to obtain the phone records and then provide them to the claimant.

Decision

Applegarth J was of the opinion that the phone records were of importance because they would detail approximately when the incident occured which would assist the parties in obtaining appropriate expert evidence, and in turn allow them to prepare for a compulsory conference. The reason the claimant needed to request the records in the manner so requested was because the respondent had not obtained the records of their own accord (which would have made them available to the claimant under s 47(1)(a)) or responded to the claimant's earlier requests for information by way of statutory declaration.

The respondent's first ground of resisting the application was that the request was for information that was not in their possession. While this may have been so, and while it may have meant that the obligation in s 47(1)(a) did not arise, responding thusly was insufficient to

discharge the respondent's obligations under s 47(1)(b).

The respondent also alleged that the request for phone records was not a request for information about the circumstances of the accident. Applegarth J did not agree. The request sought information about the time of the incident by seeking information about the time of a telephone call made shortly thereafter. Such information, although not presently known by the respondent, is of a kind that could be found out by them and accordingly, is subject to the duty to co-operate imposed by s 47.

His Honour concluded that the applicant had established grounds for the making of an order to enforce the respondent's duty to obtain and provide the phone records under s 47 of the Act.

Case Note

Shankar v The Uniting Church in Australia; Shankar v Domino's Pizza Enterprises [2012] NSWSC 1552

Whether the defendant recreation centre and / or employer were liable to the plaintiff for injury from negligent belaying by the recreation centre's employees while the plaintiff was participating in an activity as part of his employment.

The facts

The plaintiff, Vinay Shankar (**plaintiff**) brought proceedings for personal injury said to have been sustained in the course of an incident where he and other employees of Dominos were participating in a challenging physical exercise known as the 'Leap of Faith' at Vision Valley Conference & Recreation Centre.

The 'Leap of Faith' exercise required the plaintiff to wear a helmet and a harness, to which a rope was attached. He climbed a tall tree, using metal U-bars driven into the trunk, until he reached a platform attached to the tree seven or eight metres above the ground. The rope was threaded through a pulley attached to a cable suspended above the platform, and the other end of it was controlled by two Vision Valley instructors on the ground. Their function was to control the plaintiff's movement during the exercise by a process known as '*belaying*'.

A trapeze bar was suspended about a metre out from the platform. The plaintiff's task was to jump from the platform and, if possible, grasp that bar. If he succeeded, he was to let go of the bar and was to be dropped gradually to the ground by the belayers controlling the rope below. If he did not reach the bar it was still the task of the belayers to ensure his gradual descent.

The incident

The plaintiff jumped and reached the trapeze bar, grasping it with both hands. The impact hurt his left hand and he released it. Because he could not maintain his hold with his right hand alone, he let go and he fell. His evidence was that he fell some distance in a frenzied manner until he came to a sudden stop. In the process his body turned, so that he was suspended upside down. He was then slowly lowered to the ground, landing on his buttocks. He felt pain in his lower back, radiating down his legs.

Issues

- Whether the defendant's system of 'belaying' resulted in negligence under the *Civil Liability Act 2002* (NSW);
- Whether the services were rendered with due care and skill under s 74(1) *Trade Practices Act 1974* (Cth);
- Whether the plaintiff was contributory negligent; and
- Whether Dominos failed in it's duty of care as an employer.

Decision

Negligence

Hidden J believed the central liability issue was that the plaintiff should have been lowered safely to the ground whether or not he succeeded in seizing the trapeze bar. Moreover, having seized the bar, the object of the exercise was for him to release his grip, trusting that his decent would be controlled by the belayers.

The cause of the back pain was the abrupt stop of the plaintiff's free fall and the doctors saw the abrupt stop of the fall as the cause of injury. Hidden J came to the conclusion that the plaintiff's fall and abrupt stop were the result of human error, being faulty belaying. Accordingly, the belayers were held to be negligent and Vision Valley was held to be vicariously liable for their conduct.

Section 74(1) of the Trade Practices Act 1974 (Cth)

Section 74(1) provides:

'In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.'

Hidden J did not find that the harness was unfit, but for similar reasons as with negligence he did find that the services were not rendered with due care and skill because of the faulty belaying.

Contributory negligence

The defendant alleged contributory negligence by the plaintiff because he undertook the exercise with an injured hand. Hidden J held that the injury was irrelevant and ruled out contributory negligence.

Dominos: the plaintiff's employer

Hidden J acknowledged that the plaintiff's employer would not be liable for a causal act of negligence on the part of Vision Valley employees, that is, faulty belaying.

Case Note

Stojkoski v Belconnen Concrete Pty Ltd [2013] ACTSC 13

Contribution between parties where a worker fell from a ladder and scaffolding.

The facts

The plaintiff, Angelo Stojkoski (**plaintiff**), bought proceedings against four defendants for personal injury sustained at a construction site in the course of his employment as a concreter for Belconnen Concreter Pty Ltd (**Employer**). At the construction site, each floor of the building was held up by columns of concrete filled formwork, and scaffolding was erected around the formwork with a work platform at the top. Using a ladder that was secured onto the scaffolding, concreters were required to climb onto the platform and pump concrete into the columns.

On 23 January 2003 while the plaintiff was descending from a ladder, the ladder slipped out from the scaffolding and suspended off the ground, causing the plaintiff to fall approximately two metres to the ground and sustain injury to his right knee and left shoulder.

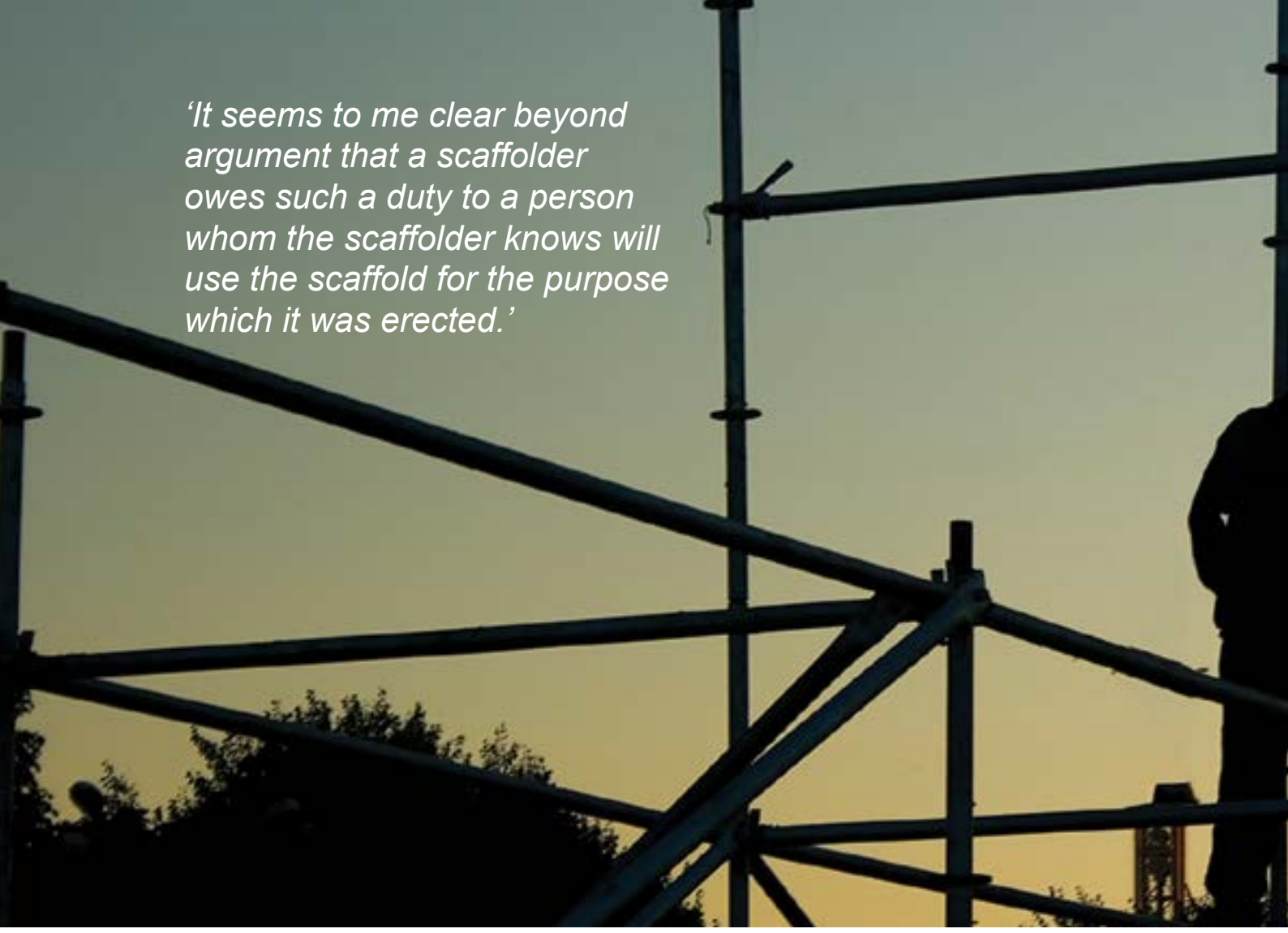
It later transpired that there were not enough ladders on site to allow a ladder to be attached to each column (as should have been the case). The ladder which the plaintiff fell from had been moved from another column on the day of the incident. It is unclear who moved the ladder.

In addition to his Employer, the plaintiff brought proceedings against the principal contractor, CCB (ACT) Pty Ltd (**Principal Contractor**), the scaffolder, Rovera Scaffolding Pty Ltd (**Supplier**), and the subcontractor responsible for erecting the scaffolding, Ironbat Pty Ltd (**Subcontractor**).

Issues

The court was required to consider the following issues:

- Whether the defendants owed the claimant a duty at common law and, if so, whether the defendants had breached their respective duties; and
- Whether the defendants had breached s 73(1) (a)-(b) and 80 (6), (7), (10) & (12) of the *Scaffolding and Lifts Regulation 1950* (ACT) (**Regulations**).



Decision

Breach of statutory duty

Each defendant was held to be a company that carried out '*building work*' for the purposes of the Regulations.

Therefore, they all had a statutory duty to ensure the ladder was securely fixed.

The court concluded that each of the defendants had breached their statutory duty by failing to take appropriate steps to ensure the ladder was secured before the plaintiff used it.

Apportionment

The court noted that the strict liability imposed by the Regulations did not take into account the culpable carelessness of each defendant. The court believed that to properly assess the extent of each defendants responsibility for the plaintiff's injury, it was necessary to consider the degree to which each defendant was also culpably negligent.

Employer

No negligence was found on part the Employer, as the Court believed it could not reasonably have known of the need to move the subject ladder or that the ladder was not correctly secured. The Employer had never received any complaints in this regard. Nevertheless, the employer was responsible to ensure its employees were protected from harm.

Scaffolder

The Court held that the Scaffolder was not negligent itself, though it may have been responsible for the negligence of its subcontractor. It had conducted

'*safety walks*' and contracted with an experienced subcontract scaffolder. Nonetheless, it was the Scaffolders responsibility to determine the amount of scaffolding and ladders for the construction works.

Principal Contractor

The Court held the Principal Contractor assumed overall responsibility for the pouring of the concrete. They were aware that there were insufficient ladders for all the columns, and therefore there would be a need to move one of the ladders. When Mr Turnbull (the Subcontract Scaffolder) left the site, the Principal Contractor failed to ensure that someone else was available to move the ladder and affix it securely to the subject column.

Subcontract Scaffolder

The Court reiterated that it was negligent for Mr. Turnbull to leave before the end of his shift when he was aware there were insufficient ladders on site.

As all four defendants had breached their statutory duties, they were each held to be liable to share a portion of the damages. Given that the Principal Contractor and Subcontract Scaffolder had engaged in negligent conduct, the court apportioned the respective contributions of the parties as follows:

- Employer— 15%
- Principal Contractor — 35%
- Supplier — 15%
- Subcontractor — 35%

[1] *Stojkoski v Belconnen Concrete Pty Ltd [2013]* ACTSC 13 [85].

Case Note

McDonald v Shoalhaven City Council [2013] NSWCA 81

An appeal considering the duty of care owed by an employer to a rescuer.

The facts

The appellant was injured whilst assisting an employee of the respondent out of a trench which had collapsed. The appellant was not employed by the respondent.

The trial judge characterised the appellant as a volunteer and found that the respondent owed him a corresponding duty of care. However, the trial judge dismissed the appellant's claim on the basis that the respondent had not breached its duty of care. In reaching this conclusion, the trial judge applied s 5B(1) of the *Civil Liability Act 2002* (NSW) (**CLA**).

The appellant appealed the decision.

Issues

- Whether the appellant's claim is governed by the CLA;
- The nature of the duty of care owed to the appellant;
- Whether the trial judge properly considered all of the evidence in reaching his conclusions about the incident and;
- Whether the trial judge erred in applying s 5B(1)(b) of the CLA.

Decision

The court of appeal allowed the appeal and the matter was remitted to the District Court for a new trial.

Was the appellant's claim governed by the CLA?

The appellant argued that the application of provisions the CLA were excluded from his claim as the duty of care owed to him by the respondent derived from the duty of care owed by the respondent to its employees, and claims for damages for negligence brought by an employee against an employer are exempt from the CLA by s 3B(1)(f).

It followed that the appellant argued that the trial judge erred in having regard to s 5B(1) of the CLA in

determining whether the respondent breached its duty of care.

Despite the court of appeal appreciating that, in some circumstances, there may be an incongruity in having the determination of a breach of a derivate duty of care determined in accordance with different principles than those which apply to the employee to whom to primary duty was owed, the argument was dismissed. Beazley P considered the words of the section were clear and must be interpreted literally.

The application of the CLA by the trial judge was therefore upheld.

Nature and content of duty of care

The appellant contended that the duty of care owed to him was derivative of the duty of care owed by an employer to an employee to take reasonable care to avoid exposing the employee to unnecessary risks of injury. The Court of Appeal agreed the trial judge had correctly identified the duty of care owed to the appellant based on the duty owed to a volunteer outlined in the case of *Chapman v Hearse* [1961] HCA 46, being a duty to take reasonable care to avoid injury to those individuals whom it is reasonably foreseeable would render assistance to employees of the respondent who are in a position of danger brought about by the respondent's alleged negligence.

Breach of duty of care

The trial judge found the respondent had not breached its duty of care to the appellant. The appellant submitted on appeal that the trial judge failed to consider the appellant's evidence as to how the accident occurred in determining whether there had been a breach of the duty of care and to make a determination as to whether the appellant's evidence as accepted.

After reviewing the evidence which was led before the trial judge, the court of appeal determined that the trial judge failed to properly consider all the evidence before him and erred in accepting the evidence of the respondent's witnesses without first commenting as to whether the appellant's evidence was accepted (or, in fact, commenting on the appellant's evidence at all). Beazley P determined that the trial judge should have expressly addressed the appellant's evidence, determined whether or not he accepted the evidence and then considered the respondent's evidence having regard to that determination. Accordingly, the court of appeal determined that the trial judge erred by failing to properly weigh all the evidence and base his determination on a proper assessment of the evidence.

In light of that conclusion, it was not necessary for the Court of Appeal to consider the application of s 5B(1)(b) of the CLA which applies a test as to whether the risk of harm was not insignificant as it was unlikely to alter the outcome of the appeal.

They remitted the case for rehearing.

Case Note

Schonell v Laspina, Trabucco & Co Pty Ltd [2013] QSC 90

The plaintiff was injured while working on scaffolding and the court considered whether the injury occurred in the manner alleged and whether the defendant scaffolder was negligent.

The facts

The plaintiff was employed as a block layer at a construction site. On the day of the incident, the plaintiff was working on a scaffold made of planks that ran between two A-frame trestles. A ladder was placed next to the scaffold to access this platform. The plaintiff, in an attempt to descend, stepped off the scaffold onto the ladder. As he placed his weight on the rung of the ladder, it gave way beneath him. In an attempt to return to the scaffold, the plaintiff alleged that his foot became trapped between the planks. This caused his left knee to twist and become injured. The plaintiff claimed that, as a consequence of the injury, he suffered from complex regional pain syndrome.

Issues

The plaintiff claimed that the ladder had a defective brace and that defendant breached the duty of care it owed him by not carrying out regular inspections on the equipment he was required to use or supplying a conventional ladder. The plaintiff also claimed that where his foot caught on the plank in his descent that the defendant should have provided or required the use of plank clamps.

Decision

The Court first considered whether there was anything negligent about the manner in which the scaffold and ladder had been set up. On the day of the incident, an employee of the defendant set up the scaffold. Upon completion, he made a visual inspection and satisfied himself that the scaffold and the ladder were safe for use. The plaintiff in evidence said that he too tested the scaffold for stability and performed a cursory examination before ascending the ladder. There was nothing patent to either man that would indicate that the ladder was likely to break or collapse.

There was no evidence of regular inspections by the defendant of the equipment, but his Honour noted that

this meant nothing because there was evidence that, in this circumstance, the pre-use inspection by the plaintiff revealed nothing untoward.

In answering the question of what would a reasonable person have done to avoid what is now known to have occurred (that is, that harm caused by the ladder breaking), his Honour thought that the pre-use inspection by both the plaintiff and the defendant was an adequate response to the possibility of the harm that occurred.

The Court went on to consider the manner in which the plaintiff was injured, that is whether his foot caught between the planks when the ladder failed. There was some discrepancy in the way in which the plaintiff described how his foot became caught. Martin J thought this of significance. His Honor seemed to imply that the plaintiff (whom he described as a person prone to exaggeration and who claimed greater pain and injury than he actually suffered) had realised that him saying that he merely slipped and injured his knee would have a detrimental impact on his claim as compared with him saying his injury was caused by a failure to use plank clamps to stabilize the scaffolding platform. While his Honour did not doubt that the plaintiff had injured his knee on the scaffold, he did not accept that the injury happened in the manner pleaded.

His Honour observed that, had he found that the plaintiff's foot did indeed become caught in the way the plaintiff alleged, he would not have found that the failure to use plank clamps was indicative of negligence. This was due to the fact that neither Australia Standards nor legislation dictated the use of plank clamps, nor was it common practice for them to be used by block layers (as compared to painters and builders). Thus, in his Honour's opinion, the plaintiff could not claim that the defendant was negligent in this respect.

In concluding, Martin J thought that the plaintiff had not demonstrated that any lack of action by the defendant either caused or contributed to his injury or that the defendant was otherwise negligent. The claim was dismissed.

Case Note

Le v Heatcraft Australia Pty Ltd and Le v Heatcraft Australia Pty Ltd & Anor [2013] NSWDC 75

Whether the *Motor Accidents Compensation Act 1999* (NSW) or the *Workers' Compensation Act 1987* (NSW) applied and was contributory negligence applicable.

The facts

On 10 November 2005 the plaintiff was injured during the course of his employment with Heartcraft Australia Pty Ltd (**Heatcraft**), a manufacturer of refrigeration units. The plaintiff had bent down to drill a screw into a unit when he was struck by a passing forklift which caused him to fall and sustain a deep laceration on his right forearm.

The driver of the forklift did not warn the plaintiff or beep his horn as he was approaching. The plaintiff brought proceedings against Heatcraft and the driver of the forklift.

Issues

- Did the *Motor Accidents Compensation Act 1999* (NSW) *(***MACA***)* or *Workers' Compensation Act 1987* (NSW) *(***WCA***)* apply to this incident?
- Was there contributory negligence on part of the plaintiff?
- Should the plaintiff's damages be reduced having regard to the application of WCA?

Decision

Levy J held the forklift was a *'motor vehicle'* within the meaning of the MACA and the incident was caused by the driver's negligence in the use or operation of the forklift. Accordingly, the plaintiff's damages were assessed under the MACA.

The defendants argued the plaintiff had failed to keep a proper look out for forklifts and had consequently failed to take reasonable care for his own safety. However, Levy J found the plaintiff was simply carrying out his assigned duties at the time of the incident, which required him to bend down and fix screws and bolts onto refrigeration units while standing on a platform where forklifts would be driven in close proximity. The plaintiff was entitled to assume that the environment in which he worked would be safe, and he was not notified of the approaching forklift before it struck

him. Accordingly, his Honour concluded there was no contributory negligence on the part of the plaintiff.

The defendants also argued that because the incident occurred at a workplace, and Heatcraft was vicariously liable for the driver's actions, the plaintiff's damages should be reduced in accordance with the WCA (which restricts the recovery of damages more so than the MACA). His Honour dismissed this argument saying that the incident was caused by the driver's operation of the forklift and it was not established that Heatcraft's system of work was deficient.

His Honour added that reducing a plaintiff's damages by reason of their employer's negligence would allow an employer to benefit from their wrongdoing.

The plaintiff was awarded damages of just over $1.3 million in accordance with the MACA.

Case Note

Jeffrey Ryan & another v A F Concrete Pumping Pty Ltd & another [2013] NSWSC 113

The plaintiff suffered facial burns on a worksite due to concrete pumping activities.

The facts

The plaintiff suffered personal injuries on 15 July 2008 while working at a construction site. The plaintiff was the director and an employee of Reliance Pools Pty Limited (**Reliance Pools**) (which had been deregistered at the time of trial). Reliance Pools had been engaged to construct a swimming pool on the seventh floor of the site. The first and second defendants were contractors at the site. The second defendant was contracted to line the swimming pool with concrete. The first defendant was engaged to pump concrete to the seventh floor.

The concrete for the pool was pumped up to the seventh floor from a hopper located on the ground level. A line of fixed pipes were connected to the hopper and a flexible hose and nozzle were attached to the end of the fixed pipe. Mr Poulianos, of the second defendant, operated the air compressor on the ground floor which delivered compressed air to the nozzle. The fixed pipe and nozzle were then used to spray concrete onto the walls and floor of the pool.

There was insufficient concrete in the hopper to concrete the whole pool. To rectify this, the first defendant blew compressed air through the concrete pipes to clear them of concrete which would then be used to complete the concreting of the pool. The first defendant experienced some difficulty in moving the concrete within the pipes. Mr Gillian, an employee of the first defendant, detached the flexible hose from the fixed pipe and attached a hose with a larger diameter to the fixed pipe. He left this hanging over the edge of the pool. The plaintiff told Mr Gillian it was very dangerous to leave the flexible pipe unsecured. Mr Gillian ignored this statement and communicated with Mr Poulianos to turn the air on. Concrete then shot out of the end of the unsecure pipe and struck the plaintiff in the face, causing significant burns.

Issues

The court was required to determine whether the first and second defendants were liable to the plaintiff in damages by reference to the *Civil Liability Act 2002* (NSW) (**Act**) and if so, whether they were entitled to contribution or indemnity from Employers Mutual NSW Ltd (**EML**), the workers' compensation insurer.

In addition, the first and second defendants cross-claimed against EML for contribution and indemnity in the event that Reliance Pools would, if sued, be liable to the plaintiff. In turn, EML claimed the amount it had paid to the plaintiff by way of worker's compensation payments from the first and second defendants, if either was liable to the plaintiff.

The second plaintiff, Reliance Pools International Pty Limited (**Reliance Pools International**) a separate entity to Reliance Pools, sought damages against the first and second defendants on the basis of an action *per quod servitium* for the loss of the plaintiff's services.

Decision

First defendant

The Supreme Court found the first defendant liable to the plaintiff. It considered it reasonably foreseeable that when compressed air is applied to concrete within a pipe, the concrete will be emitted at a high speed from the end of the pipe. While the concrete emitted from a pipe may still be in liquid form, the Court noted the quickness at which concrete can set into a solid form when it ceases to be in motion. Accordingly, the risk of concrete coming into contact with someone and causing injury was not insignificant.

The Court further considered it foreseeable that a flexible hose, through which concrete and compressed air would pass, would whip around violently unless secured. The risk of concrete being emitted from the end of the flexible hose and injuring someone is significant unless the hose is adequately secured and people are cleared from the area immediately surrounding the hose.

The first defendant knew or ought to have known there was a risk of serious injury if it did not take reasonable safety precautions. The Court considered a reasonable person in the position of the first defendant should have taken the following steps:

- Performed the blowing operation as soon as possible after the concrete pumping had ceased to minimise the risk of the concrete setting within the pipes;

- Secured the end of the flexible hose before commencing the blowing operation; and
- Ensured there were no persons in the immediate vicinity of the area.

The Court held that a reasonable person in the position of the first defendant should not have directed compressed air be applied to the pipes until these precautions had been taken.

Second defendant

The Court was not satisfied the second defendant breached its duty of care to the plaintiff. The first defendant argued the second defendant was negligent in that the concrete should have been blown downwards through the pipes and the second defendant should not have used the air compressor to blow concrete in circumstances where it knew or ought to have known that people were in the vicinity of the end of the pipe.

The Court did not accept the first defendant's submissions. The Court accepted the evidence of the second defendant that it was safer to blow concrete upwards. The Court further considered that while it was not safe for persons to be in the immediate vicinity of the discharge end of the pipe when concrete was being blown, it was safe for others to be in the area as long as they were not near the end of the pipe.

Reliance Pools

To determine the cross-claim for contribution and indemnity against EML, the Court was required to consider whether Reliance Pools would have been found liable in negligence if it had been sued by the plaintiff. As the plaintiff's employer, Reliance Pools owed the plaintiff a non-delegable duty to take reasonable steps to provide the plaintiff with a safe system of work. However, the court did not find Reliance Pools had breached its duty. The accident was the result of the negligent actions of the first defendant and the court did not believe there was any action Reliance Pools could have reasonably taken to reduce the risk to the plaintiff.

The first defendant argued Reliance Pools was negligent in failing to require the plaintiff to wear goggles. However, the Court found the wearing of goggles was irrelevant to the accident as there was no relevant injury to the plaintiff's eyes. Accordingly, the first defendant was not entitled to indemnity against EML as Reliance Pools was not negligent.

Contributory Negligence

The Court dismissed the first defendant's submissions that the plaintiff was negligent. The Court found the plaintiff did all he reasonably could do to both protect himself and others in the vicinity by challenging Mr Gillian.

Action per quod servitium

A fortnight before the accident the plaintiff registered Reliance Pools International to pursue business deals in Qatar. The court accepted that the plaintiff could not engage in the venture proposed to be undertaken by Reliance Pools International as a result of the accident. The court considered various case law and concluded that a company whose executive director is disabled through another's negligence can recover loss from a wrongdoer.

Although Reliance Pools International had not started trading at the time of the accident, some groundwork was done prior to and after the accident regarding the proposed venture. The court found the negligence of the first respondent deprived Reliance Pools International of the opportunity of seeing the venture come to fruition as the plaintiff was an integral part of the business affairs of Reliance Pools International and was personally responsible for the reputation of Reliance Pools which, Reliance Pools International sought to exploit.

The Court considered the claim by Reliance Pools International ought to be assessed as a claim for the loss of chance. There was some uncertainty about the terms of Reliance Pools International's remuneration, the commencement of the venture and its probable duration. The court assessed the past loss of Reliance Pools International from late 2009, the date at which the plaintiff conceded income would first be received, to the date of judgment at 50% of net profits plus interest. The court allowed a buffer of $100,000 for future loss to reflect the loss by Reliance Pools International of the opportunity to exploit the plaintiff's expertise to make a profit.

EML cross-claim

The Court found that EML was entitled to succeed in its cross-claim against the first defendant for reimbursement of the workers compensation payments made to, and expenses paid for, the benefit of the plaintiff, together with interest.

Carter Newell presentations

legalwise SEMINARS

CPD Program March 2014

5 March 2014

Special Counsel Nola Pearce presenting ethics in practice including conflicts of interest, the duty of confidentiality, minimising the risk of complaints and how to respond to a complaint to achieve a meaningful outcome for all parties.

12 March 2014

Partner Tony Stumm examining development and administration of corporate governance including coverage, policy questions and how to ensure introduced policies are adhered to.

27 March 2014

Partner Tony Stumm covering drafting issues for shareholder agreements including the purpose of shareholder agreements, dispute resolution and mediation, friction between shareholders, regular review and annual share valuations.

28 March 2014

Special Counsel Brett Heath presenting drafting contracts and avoiding costly mistakes at which he will share many insights into to the costly mistakes made with certain common-problem-clauses.

New IR Laws for HR Managers

20 March 2014

Special Counsel Stephen Hughes to present on sham contracting arrangements including fair work protections and penalties.

Queensland Law Society

QLS Annual Symposium

22 March 2014

Partner Andrew Shute chairing Commercial Litigation / ADR sessions covering recent cases, practice directions and discovery.

AKOLADE

Directors' and Officers' Duties and Liabilities Forum

31 March 2014

Corporate Partner Tony Stumm will examine directors' liability for personal tax debts covering changes to s 254T of the Corporations Act, directors' personal liability, tax office investigations, payment avoidance and communications between in-house tax and boards.

1 April 2014

Financial Lines Partner Mark Brookes will examine directors' and officers' insurance including the scope of cover for liability and costs, exclusions from cover and recent case law.

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